

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DEBORA INGUAGIATO,	)	
	)	
Plaintiff,	)	
	)	No. CV-08-1444-HU
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	OPINION & ORDER
	)	
Defendant.	)	
_____	)	

Richard A. Sly  
1001 S.W. Fifth Avenue, Suite 310  
Portland, Oregon 97204

Attorney for Plaintiff

Kent S. Robinson  
ACTING UNITED STATES ATTORNEY  
Adrian L. Brown  
ASSISTANT UNITED STATES ATTORNEY  
1000 S.W. Third Avenue, Suite 600  
Portland, Oregon 97204-2902

Stephanie R. Martz  
SPECIAL ASSISTANT UNITED STATES ATTORNEY  
Office of the General Counsel  
Social Security Administration  
701 Fifth Avenue, Suite 2900 M/S 901  
Seattle, Washington 98104-7075

Attorneys for Defendant

1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Debora Inguagiato brings this action for judicial  
3 review of the Commissioner's final decision which found that  
4 plaintiff had resources exceeding the maximum allowable for  
5 continued receipt of Supplemental Security Income (SSI). This  
6 Court has jurisdiction under 42 U.S.C. § 405(g) (incorporated by 42  
7 U.S.C. § 1383(c)(3)).

8 Both parties have consented to entry of final judgment by a  
9 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
10 73 and 28 U.S.C. § 636(c). I affirm the Commissioner's decision.

11 PROCEDURAL HISTORY

12 Plaintiff has severe chronic open angle glaucoma and severe  
13 axial myopia, rendering her legally blind. Tr. 162. In 1992,  
14 plaintiff filed concurrent claims for SSI and Social Security  
15 Disability (SSD). Tr. 18. She was found to be disabled and has  
16 since received a combination of SSD and SSI benefit payments. Id.

17 In 2004, the Social Security Administration (SSA) determined  
18 that plaintiff had received money from a family member as a gift,  
19 creating an overpayment of benefit payments in the amount of  
20 \$4,870. Id.; see also Tr. 22-23, 30-40, 47-55, 207-10.

21 Plaintiff sought reconsideration of the SSA's decision,  
22 contending that the money she received from her cousin was a loan,  
23 not a gift. Tr. 41-42. The reconsideration request was denied.  
24 Tr. 43-46.

25 Plaintiff requested a hearing and on June 28, 2006, she  
26 appeared, with counsel, before an Administrative Law Judge (ALJ).  
27 Tr. 176-99. On August 11, 2006, the ALJ issued a decision finding  
28 that the money plaintiff received from her cousin was a gift, not

1 a loan. Tr. 15-20. The Appeals Council then denied plaintiff's  
2 request for review of the ALJ's August 11, 2006 decision. Tr. 202-  
3 05.

#### 4 BACKGROUND

5 Plaintiff became a licensed massage therapist in 1990 in an  
6 effort to "restructure" her life around her vision loss. Tr. 185.  
7 Plaintiff obtained her massage therapist training with assistance  
8 from the Oregon Commission for the Blind. Tr. 156. Since being  
9 licensed, she has struggled to build a massage practice. Tr. 156.  
10 She never earned more than \$200 in a week. Id. In 1997, the  
11 Oregon Commission for the Blind discontinued its assistance because  
12 plaintiff's massage business was unsuccessful. Tr. 157. As of  
13 April 2006, plaintiff's massage business "barely exist[ed]." Id.  
14 Her business was "practically non-existent" and it provided  
15 "basically . . . no income[.]" Id.

16 In April 2004, as part of a routine review, the SSA notified  
17 plaintiff that it needed information to determine if she remained  
18 financially eligible for continued receipt of SSI benefits. Tr.  
19 22-23. This review required plaintiff to provide copies of bank  
20 statements and other financial information. Id. Plaintiff brought  
21 the requested information to the SSA office. Tr. 58. In the cover  
22 letter she wrote and submitted with the documents, plaintiff  
23 explained that her March 2002 to April 2004 bank statements showed  
24 "numerous deposits to my checking account that are not validated by  
25 my meager income or by the small amount of SSI and SSD that I  
26 receive." Id. She explained that she received these deposits from  
27 her cousin as a loan and that plaintiff had every intention of  
28 paying it back. Id. Plaintiff noted that her cousin had made a

1 "death-bed promise" to both plaintiff's mother and the cousin's  
2 mother, to "help me out when necessary." Id. Plaintiff stated  
3 that she was working on ways to build up her massage practice and  
4 to increase her income. Id.

5 Plaintiff's cousin also wrote a letter to the SSA at this  
6 time. Tr. 59. The cousin, Janie Nelson Meyer, wrote that she had  
7 promised her mother and plaintiff's mother to "help [plaintiff] out  
8 whenever she needed it." Id. Meyer was confident that plaintiff  
9 would build her massage practice and no longer need Meyer's help.  
10 Id. Meyer admitted that she had lent money to plaintiff to "pay  
11 her bills, maintain a decent standard of living and for basic  
12 survival." Id. As of April 22, 2004, the total amount of money  
13 lent by Meyer to plaintiff was \$25,675. Id. Meyer also stated  
14 that plaintiff had until the end of 2004 to increase her income  
15 through her massage business and to start paying back the money.  
16 Id.

17 In addition to these two letters, plaintiff submitted a  
18 promissory note, signed by plaintiff on April 21, 2004, stating  
19 that she promised to pay Meyer \$25,675, and further stating that  
20 the amount may be increased by future distributions which would be  
21 recorded in an addendum to the note. Tr. 60.

22 In June 2004, the SSA determined, both initially and on  
23 reconsideration, that plaintiff had resources worth more than  
24 \$2,000, and that she was therefore ineligible for SSI benefits for  
25 each month she had excess resources. Tr. 31-40, 43-46. The SSA  
26 concluded that a bona fide loan between Meyer and plaintiff did not  
27 exist. Tr. 44.

28 In advance of her hearing before the ALJ, plaintiff wrote a

1 letter to the SSA in which she stated that the money received from  
2 Meyer was "to help me with basic survival issues due to the fact  
3 that my SSI and SSD combined left me below both State and Federal  
4 Poverty Guidelines[.]" Tr. 151. Plaintiff explained that Meyer  
5 had assured her that plaintiff would be a beneficiary of Meyer's  
6 will and that plaintiff "may inherit far more than I owe her." Id.  
7 Therefore, in plaintiff's opinion, "the 'resources' and opportunity  
8 to pay [Meyer] back are clearly available." Id. At about the same  
9 time, Meyer also submitted a letter to the SSA explaining that  
10 plaintiff is a beneficiary in Meyer's will and would inherit more  
11 than plaintiff owes. Tr. 153. Meyer described the loans as a  
12 "personal agreement between family members without a real time  
13 frame for payment." Id.

14 At the hearing in June 2006, plaintiff testified that the  
15 money from Meyer was intended primarily for business-related things  
16 such as payments for continuing education needed to maintain her  
17 massage therapist license, insurance, and other expenses. Tr. 186-  
18 87. She told the ALJ that she was hoping to build up her massage  
19 business to the point where not only was she self-supporting, but  
20 that she would then repay Meyer the money. Tr. 192. Although  
21 plaintiff stated that she "even had a business plan," when pressed  
22 by the ALJ, she noted that she had had two or three of them,  
23 between 1995 and 2000, and that the business plan had not improved  
24 her income. Id.

25 Plaintiff also testified that originally, the agreement with  
26 her cousin was oral. Tr. 189. She acknowledged that the agreement  
27 was put in writing only after she received notice of the financial  
28 audit by the SSA. Id. Although she stated that she had kept track

1 of the money received from her cousin, Tr. 188-89, she could not  
2 produce a hard copy of any document reflecting what she received  
3 and when. Id. Thus, when she drafted the promissory note in April  
4 2004, she had to rely on the bank statements to calculate the sums  
5 received. Tr. 189-91.

6 THE ALJ'S DECISION

7 The ALJ determined that Meyer provided funds to plaintiff in  
8 the following amounts: \$9,500 in 2002, \$10,975 in 2003, and \$5,200  
9 in 2004, for a total of \$21,675.<sup>1</sup> Tr. 19. He noted plaintiff's  
10 testimony that Meyer helped her with funds for classes, insurance,  
11 and other items related mostly to her self-employment. Id. He  
12 also noted plaintiff's testimony that both she and Meyer kept track  
13 of the money, and that the total became larger than they intended.  
14 Id.

15 The ALJ explained, however, that while plaintiff indicated  
16 that she kept track of the amount of money, plaintiff acknowledged  
17 that she did not have records to document how she did so. Id. The  
18 ALJ noted plaintiff's testimony that the money was not a  
19 conventional loan and was different because it was a family  
20 situation. Id.

21 The ALJ further noted plaintiff's testimony that Meyer was  
22 going to name plaintiff as a beneficiary in Meyer's will, and that  
23 upon Meyer's death, the amount of money plaintiff had previously  
24 received from Meyer would be repaid from the bequest. Id.  
25 According to the ALJ, plaintiff "characterized the money provided

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26  
27 <sup>1</sup> I assume the \$21,675 figure is a typographical error as  
28 the sums the ALJ separately listed for 2002, 2003, and 2004 equal  
\$25,675 when added together.

1 as an advance on an inheritance." Id.

2 The ALJ recited the contents of the April 21, 2004 promissory  
3 note, as well as the April 22, 2004 letter from Meyer to the SSA  
4 and the April 26, 2004 letter from plaintiff to the SSA explaining  
5 that the money was a loan, not a gift. Id. The ALJ then stated  
6 that "[i]t must be noted that these 'documents' were all created  
7 after the issue of excess resources, unearned income, eligibility  
8 for Supplemental Security Income, and the overpayment arose." Id.  
9 The ALJ cites to an April 20, 2006 statement by Meyer in which she  
10 indicated that the money was a loan and that it was a personal  
11 agreement with family members "without a real time frame" for  
12 payment. Id.

13 The ALJ then offered the following reasoning in support of his  
14 determination that the money from Meyer to plaintiff was a gift,  
15 not a loan:

16 While the claimant contends that the money provided was  
17 a loan, the evidence provided fails to support this  
18 conclusion. The promissory note was not created until  
19 after the problem of overpayment arose and was not in  
20 effect at the time the money was advanced to the  
21 claimant. Therefore, there was no loan agreement prior  
22 to the alleged loan or during the period of time in  
23 question. There is no evidence of a conventional  
24 individual loan, no consideration was given for the  
25 alleged loan, and the promissory note is effectively not  
26 legally enforceable. While the Social Security  
27 Regulation acknowledges loans without interest[,], most  
28 loans made, even those between close parties, do require  
the payment of interest and include when and how the loan  
is to be repaid, and, provide information as to  
consequences for default. There is also the fact that  
the claimant, despite allegations to the contrary, lacks  
even the most minimal ability to repay any loan. Her  
self-employment was not successful in the past, and the  
contention that she was going to build up her business  
and repay the alleged loan is at odds with consistent  
history. Furthermore, subsequent to the determination of  
the overpayment the claimant has not been able to build  
up her business and, in fact, has engaged in less self-  
employment. Finally, the contention that the claimant

1 has the means to repay the loan because she is named as  
2 a beneficiary in the cousin's will does not advance her  
3 argument. At best, this is an unenforceable promise by  
4 her cousin that could change at any time. Indeed, there  
5 may be nothing in her estate to bequeath. Of greater  
importance, however, is that this argument strongly  
supports the proposition that this money was indeed not  
a loan but an advance on a planned bequest at death based  
on the family considerations discussed by the claimant.

6 Id. at 19-20.

#### 7 STANDARD OF REVIEW

8 The ALJ's decision may be set aside only if it is not  
9 supported by substantial evidence or if it is based on legal error.  
10 Bray v. Commissioner, 554 F.3d 1219, 1222 (9th Cir. 2009).  
11 "'Substantial evidence' means more than a mere scintilla, but less  
12 than a preponderance. It means such relevant evidence as a  
13 reasonable mind might accept as adequate to support a conclusion."  
14 Valentine v. Commissioner, 574 F.3d 685, 690 (9th Cir. 2009)  
15 (internal quotation omitted). It is a "highly deferential standard  
16 of review." Id. Additionally, even if the evidence could result  
17 in "more than one rational interpretation, it is the ALJ's  
18 conclusion that must be upheld." Burch v. Barnhart, 400 F.3d 676,  
19 679 (9th Cir. 2005).

#### 20 DISCUSSION

21 Under the applicable law, unmarried SSI beneficiaries may own  
22 no more than \$2,000 in countable resources to maintain their  
23 eligibility for SSI benefits. 20 C.F.R. § 416.1205(c). Money  
24 borrowed by a claimant is not considered income, and thus, does not  
25 count toward the \$2,000 resource ceiling. 20 C.F.R. § 416.1103(f).

26 Social Security Regulation (SSR) 92-8p (available at 1992 WL  
27 466905), provides that a loan is "an advance from lender to  
28 borrower that the borrower must repay, with or without interest."

1 Id. at \*2. SSR 92-8p further provides that "[t]he loan agreement  
2 may be oral or written, as long as it is enforceable under State  
3 law." Id. Additionally, plaintiff bears the burden of proof with  
4 respect to the bona fide nature of the loan. Id.

5 As defendant notes, under the applicable law and regulation,  
6 for the money plaintiff received from Meyer not to count as a  
7 resource, potentially disqualifying her from receiving SSI in  
8 certain months, plaintiff has to prove that she was bound by an  
9 enforceable loan agreement that required her to repay the money.

10 Plaintiff asserts that the ALJ's decision is not supported by  
11 substantial evidence and that the ALJ applied an improper legal  
12 standard. Pltf's Opening Brief at p. 8. As to the alleged legal  
13 error, although it is not entirely clear, I understand her argument  
14 to be that the ALJ erred because he concluded that the money  
15 plaintiff received from Meyer was not a loan because the agreement  
16 was not originally in writing.

17 As I read the ALJ's rationale, I note four independent reasons  
18 for his conclusion that the money was a gift, not a loan: (1) the  
19 promissory note was created after the fact and after plaintiff  
20 learned of the SSA audit; (2) there were no indicia of a  
21 conventional loan including no consideration, no interest, no terms  
22 of repayment, and no consequences for default; (3) plaintiff had no  
23 ability to repay the loan from her self-employment; and (4) the  
24 fact that Meyer and plaintiff believed that plaintiff could repay  
25 the loan from the anticipated bequest from Meyer demonstrated that  
26 the money was essentially an advance of a gift or bequest.

27 The ALJ cited several reasons for his conclusion, only one of  
28 which had to do with the form of the agreement. Additionally, even

1 as to the form of the agreement, the ALJ's conclusion was not based  
2 on the fact that the agreement was oral, but rather, on the fact  
3 that the timing of the creation of the written document raised  
4 questions about the underlying nature of the payments. Thus, I  
5 reject plaintiff's argument initially because I disagree with her  
6 position that the ALJ's decision was based on the fact that the  
7 agreement was not in writing.

8       Additionally, the ALJ did not suggest that oral agreements are  
9 unenforceable under Oregon law. Instead, as I understand the  
10 decision, the ALJ indicated that the promissory note was not  
11 legally enforceable because there was insufficient evidence to  
12 indicate that the payments were ever intended as a loan. Without  
13 an initial oral obligation to repay the money, the subsequently  
14 created promissory note was unenforceable under Oregon law. See  
15 Marriage of Street, 90 Or. App. 466, 469-72, 753 P.2d 424, 425-27  
16 (1988) (when collective facts showed that parties to transaction  
17 treated money as a gift, later-created promissory notes did not  
18 alter the nature of the transfer and such promissory notes were  
19 unenforceable).

20       In terms of substantial evidence, plaintiff contends that  
21 there is no evidence that the payments to plaintiff were ever  
22 intended by Meyer as a gift. She first argues that if she failed  
23 to repay Meyer out of funds generated by her self-employment as a  
24 massage therapist, the potential inheritance from Meyer was another  
25 source of funds she could have used.

26       Second, plaintiff contends that the ALJ should not have relied  
27 on the fact that there was no contemporaneous documentation of the  
28 amounts provided by Meyer to plaintiff because nothing in the law

1 requires that a loan must be documented by certain records.  
2 Furthermore, plaintiff argues, the timing of the creation of the  
3 written documents does not contravene the expression of an oral  
4 agreement made at the commencement of the loans in 2002.

5 Next, plaintiff argues that gifts are traditionally made in  
6 lump sums and thus, because she received payments over time, the  
7 money here was a loan. Plaintiff cites no basis to support this  
8 assertion. Plaintiff then argues that just because she might not  
9 have been able to earn what she had hoped to earn in her business  
10 does not alter her intent at the time payments began. Finally,  
11 plaintiff contends that even if the money is an advance of a  
12 planned bequest, it does not make the money a gift as opposed to a  
13 loan.

14 Plaintiff's arguments are unpersuasive. As discussed above,  
15 the ALJ articulated several reasons in support of his conclusion  
16 that plaintiff's assertion that the money she received from Meyer  
17 was a loan rather than a gift, is not credible. An inability to  
18 repay money is relevant to the determination of whether the  
19 transfer was intended as a gift or a loan. E.g., Street, 90 Or.  
20 App. at 471, 753 P.2d at 426 (noting, in the context of discussing  
21 facts suggesting that money was a gift, not a loan, "it is  
22 extremely difficult to understand how husband and wife could  
23 possibly have paid any of the notes on demand or otherwise. . . .  
24 Father could not realistically have expected the loans to be repaid  
25 . . . .").

26 Here, the record shows that plaintiff had generated only  
27 negligible income from her massage business over the years.  
28 Although she contends that she intended, at the "beginning of the

1 loan process in 2002," to make her business more successful, the  
2 ALJ's finding that this was not consistent with the history  
3 demonstrated in the record, is supported by substantial evidence.

4 Plaintiff had earned very little money as a massage therapist  
5 when Meyer began transferring money to plaintiff in 2002. The  
6 Oregon Commission of the Blind had ended its support five years  
7 earlier because the business was unsuccessful. Plaintiff testified  
8 about a business plan at the hearing, but then indicated that her  
9 two to three business plans were developed between 1995 and 2000.  
10 Tr. 192. Additionally, she spent very little of the money she  
11 received from Meyer in attempting to build her business. Tr. 116  
12 (showing, in 2002, marketing expenditures of \$375 for a magazine  
13 advertisement and \$49 in new business cards); Tr. 108 (showing, in  
14 2003, \$810 spent on a magazine advertisement, \$476 on a phone book  
15 advertisement, and under \$100 on miscellaneous expenses from  
16 retailers such as Office Depot).

17 As the ALJ noted, the record does not support plaintiff's  
18 contention that she was going to be able to build up her business  
19 to the point of repaying Meyer. Additionally, the ALJ's conclusion  
20 regarding the use of a future bequest as a means of repayment is  
21 sound. The bequest is an unenforceable promise because Meyer  
22 retained the ability to change her will at any time. Furthermore,  
23 plaintiff admitted at the hearing that she did not know the amount  
24 she expected to inherit, and that whatever Meyer left in her estate  
25 would also be shared with Meyer's children and grandchildren. Tr.  
26 194. The ALJ drew a reasonable inference from the evidence in  
27 concluding that the possibility of an eventual inheritance of an  
28 undisclosed sum did not reasonably provide plaintiff with a means

1 of repaying the sums Meyer transferred to her.

2 Finally, as to plaintiff's argument that the lack of  
3 contemporaneous documentation is not inconsistent with a loan, this  
4 is a relevant factor. E.g., Street, 90 Or. App. at 470-71, 753  
5 P.2d at 426 ("the lapse of time between receipt of the money and  
6 execution of the notes suggests that the money was a gift and that  
7 the notes were meant to serve some purpose other than to evidence  
8 a real debt."). The ALJ's inference was reasonable given  
9 plaintiff's failure to keep track of the payments as received and  
10 the subsequent creation of documentation.

11 The ALJ's findings must be upheld if they are supported by  
12 inferences reasonably drawn from the record. Batson v.  
13 Commissioner, 359 F.3d 1190, 1193 (9th Cir. 2004). Here, the ALJ's  
14 conclusion is based on reasonable inferences drawn from substantial  
15 evidence in the record.

## 16 II. Waiver and Other Arguments

17 In her opening memorandum, plaintiff incorporates by reference  
18 written arguments made to the Appeals Council on her behalf by  
19 attorney Linda Ziskin in April 2007. Pltf's Opening Brief at p. 5.  
20 This Appeals Council brief is found at pages 172 to 175 of the  
21 Administrative Record. There, Ziskin makes three arguments, one of  
22 which is that the money from Meyer was a loan, not a gift. Given  
23 that the basis for plaintiff's appeal of the ALJ's decision in this  
24 case is this same argument, and given that I affirm the ALJ, I do  
25 not discuss this further.

26 Ziskin also contends that the SSA never sent plaintiff the  
27 required overpayment notice. In response, defendant concedes that  
28 a copy of the Notice of Overpayment that had been sent to plaintiff

1 in July 2004 was, at one point, inadvertently omitted from the  
2 administrative record. It is now found at pages 207 to 211 of the  
3 record. Thus, the argument is moot.

4 Finally, Ziskin argues that plaintiff should be granted a  
5 waiver of a repayment obligation. Plaintiff also mentions the  
6 waiver request in the procedural and historical background section  
7 of her opening brief. Pltf's Opening Brief at pp. 4, 5. However,  
8 as explained below, the waiver request is not properly before this  
9 Court.

10 Plaintiff first received notice that her SSI benefits were to  
11 be changed based on the excess income received from Meyer, on June  
12 2, 2004. Tr. 30-40. That notice told plaintiff of her right to  
13 appeal within sixty days, and further informed her that if she  
14 filed her appeal within ten days, she would continue to receive the  
15 same SSI check while the case was reviewed. Tr. 33-34. Plaintiff  
16 filed her appeal on June 10, 2004, within the ten days. Tr. 41.  
17 SSA then reconsidered the determination of her SSI ineligibility,  
18 but it adhered to its prior determination. Tr. 43-46. Plaintiff  
19 was informed of her right to request a hearing, which she did. Tr.  
20 44-45, 56.

21 The formal notice of overpayment was issued on July 8, 2004.  
22 There, plaintiff was told that she could ask for a waiver, ask for  
23 an appeal, or both. Tr. 207. As to the waiver, the overpayment  
24 notice explained that in certain cases, a claimant may not have to  
25 repay the overpayment to the SSA. Id. The SSA explained that it  
26 can waive the collection of an overpayment if: (1) it is not the  
27 claimant's fault that the claimant received too much money; and (2)  
28 paying back the money would mean the claimant could not pay bills

1 for food, clothing, housing, medical care, or other necessary  
2 expenses, or it would be unfair for some other reason. Id.  
3 Plaintiff was told she could fill out a waiver form. Id.

4 Plaintiff submitted a waiver request on April 17, 2006, almost  
5 two years after being notified of her right to do so, and almost  
6 two years after her request for an appeal of the initial  
7 determination. Tr. 141-48. There, she indicated that the  
8 overpayment was not her fault and she could not afford to pay the  
9 money back, or that repayment was unfair. Tr. 141. In answering  
10 the question of why she was not at fault in causing the overpayment  
11 or in accepting the money, plaintiff wrote that the money was a  
12 loan from a family member and that the SSA wrongfully determined  
13 that it was a gift. Tr. 142.

14 On May 1, 2006, the SSA responded to plaintiff's waiver  
15 request. Tr. 136. It informed her that the waiver form is not  
16 intended for use when a person disagrees with the facts that caused  
17 the overpayment. Id. In such a case, the SSA treats the request  
18 as an appeal rather than a waiver. Id. Because plaintiff already  
19 had a pending appeal on the issue, the SSA stated that its field  
20 office lacked jurisdiction to consider it and instead, it would  
21 forward her request to the Office of Hearings and Appeals. Id.

22 During plaintiff's hearing before the ALJ on June 28, 2006,  
23 plaintiff's counsel noted that he was unsure if the waiver request  
24 was properly before the ALJ. Tr. 183. The ALJ did not mention it  
25 in his decision which addressed the issue of "excess resources"  
26 only. Tr. 18.

27 The September 2, 2008 Appeals Council order denying  
28 plaintiff's request for review explained that the waiver issue was

1 not before the ALJ. Tr. 203. At that time, no initial or  
2 reconsidered determination had been made on the waiver issue and  
3 the hearing notice did not include it as an issue to be addressed  
4 at plaintiff's hearing. Id. The Appeals Council explained that  
5 because of the language plaintiff used in the "fault" section of  
6 her waiver request, the local SSA office concluded that she was not  
7 truly seeking a waiver, but instead, was appealing the  
8 determination that an overpayment had occurred. Id.

9 At this point, any issue regarding plaintiff's waiver request  
10 is not before this Court. A federal court's scope of judicial  
11 review under the Social Security Act is limited to the  
12 Commissioner's final decision after a hearing. 42 U.S.C. § 405(g);  
13 Subia v. Commissioner, 264 F.3d 899, 902 (9th Cir. 2001). Because  
14 the ALJ did not address the issue of plaintiff's request for a  
15 waiver of the overpayment, there has been no final decision subject  
16 to judicial review. Id.

17 Although plaintiff states she incorporates Ziskin's April 2007  
18 arguments by reference, plaintiff does not separately raise or  
19 brief the waiver issue in the materials submitted to this Court.  
20 And, she affirmatively describes the issue for judicial review as  
21 the August 11, 2006 decision of the ALJ which determined that  
22 plaintiff had received excess resources in the form of a gift, not  
23 a loan. Pltf's Opening Brief at pp. 8-9. The absence of any  
24 argument regarding waiver in plaintiff's memoranda supports the  
25 conclusion that plaintiff herself limits this appeal to the ALJ's  
26 determination that the money from Meyer was a gift, not a loan.  
27 Plaintiff's request for waiver is not properly before the Court.

28 / / /

CONCLUSION

The Commissioner's decision is affirmed.

IT IS SO ORDERED.

Dated this 3rd day of December, 2009.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge